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Paper No. 20
EWH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Altair Engineering, Inc.

Serial No. 75/698,596

William M. Hanlon, Jr. for Altair Engineering, Inc.

Jennifer M. B. Krisp, Trademark Examining Attorney, Law
Office 112 (Janice O'Lear, Managing Attorney).

Before Hanak, Quinn and Holtzman, Administrative Trademark
Judges.

Opinion by Hanak, Administrative Trademark Judge.

On May 4, 1999 Altair Engineering, Inc. (applicant)
filed an intent-to-use application seeking to register
HYPERVIEW in typed drawing form for "computer software,
namely a general purpose post-processor and visualization
tool for mechanical system simulation and engineering data
providing three dimensional animation and XY plotting
capabilities for analyzing mechanical system simulation
results."

Subsequently, the United States Patent and Trademark
Office issued a Notice of Publication Under 12(a)

indicating that "the mark of the application identified appears to be entitled to registration," and that the mark would be published in the Official Gazette on December 3, 1999 "for the purpose of opposition by any person who believes he will be damaged by the registration of the mark."

Thereafter, applicant filed its Statement of Use indicating that the mark was first used on February 12, 1999 and was first used in interstate commerce on February 28, 1999. Attached to the Statement of Use was a specimen showing use of the mark.

In an Office Action dated November 20, 2000, the Examining Attorney stated that "the drawing displays the mark as HYPERVIEW. However, this differs from the display of the mark on the specimens, where it appears as HYPERVIEW PLAYER." Continuing, the Examining Attorney advised that "the applicant must submit a substitute specimen that shows use of the mark as it appears on the drawing."

Applicant did not submit a substitute specimen. In an Office Action dated May 2, 2001, the Examining Attorney made final "the requirement for a substitute specimen showing use of the mark HYPERVIEW."

When the refusal to register was made final, applicant appealed to this Board. Applicant and the Examining

Attorney filed briefs. Applicant did not request a hearing.

At pages 1 and 2 of its brief, applicant "acknowledges that the term 'player' does appear next to the mark HYPERVIEW but the applicant submits that this is a descriptive term [player] and would not be viewed as part of the mark." In response, the Examining Attorney at page 4 of her brief stated that "the dictionary definition of the term 'player' makes no reference whatsoever to computer software, or to any product or service associated with computer software." At page 5 of her brief, the Examining Attorney provided the following definition of the term "player" taken from the American Heritage Dictionary of the English Language (3d 1992): "1. One that plays, especially: a. Sports & Games. One who participates in a game or sport. b. A gambler. c. One who performs in theatrical roles. d. Music. One who plays an instrument. 2. An active participant: a major player in world affairs. 3. Music. The mechanism actuating a player piano. 4. A phonograph."

The leading case dealing with a situation where an applicant attempts to register what is arguably only a part of its trademark is In re Servel, Inc., 181 F.2d 192, 85 USPQ 257 (CCPA 1950). In that case, applicant sought to register SERVEL despite the fact that the specimens of use

showed that the title of applicant's periodical was SERVEL INKLINGS. In reversing the refusal to register SERVEL per se, the Court stated that "the courts in a proper case may recognize the right to registrations of one part of an owner's mark consisting of two parts." 85 USPQ at 260.

In view of the holding in Servel, this Board has been quite liberal in allowing applicants to register what are arguably only portions of the trademarks shown on the specimens of use. For example, this Board allowed registration of DUMPMMASTER based upon the following specimen of use:

In so doing, this Board stated that "there can be no question but that the composite shown above constitutes two distinct terms, each of which is capable of distinguishing applicant's goods from like goods, if they were to be used separably as trademarks." In re Dempster Bros., Inc., 132 USPQ 300 (TTAB 1961). In allowing registration of DUMPMMASTER per se, the Board was not troubled by the fact that the words DEMPSTER and DUMPMMASTER were totally

intertwined in that they shared the same large first letter and the same large final letter (i.e. the D and the R).

In a more recent decision, this Board allowed the registration of the mark TINEL-LOCK based upon the following specimen of use:

In so doing, the Board was not concerned with the fact that the mark sought to be registered (TINEL-LOCK) was joined with hyphens to the model number (TR06AI) and the generic term (RING). In re Raychem Corp., 12 USPQ2d 1399 (TTAB 1989).

In stark contrast to the Demptser and Raychem cases, in the present case the mark sought to be registered (HYPERVIEW) is physically separated from the word PLAYER in applicant's specimens of use. Moreover, as used in applicant's specimens of use, the term "player" is indeed descriptive, if not generic. In this regard, we take judicial notice of the fact that in the computer field, the term "player" is defined as follows: "A small program launched or used by a Web browser to process a specific

type of file that the browser cannot handle. ... see also plug-in." Dictionary of Networking (3d ed. 1999). This dictionary in turn defines the word "plug-in" as follows: "A small program you can link in your Web browser to add a special capability not originally present or to organize new files or content."

The first sentence of applicant's specimen of use reads as follows: "The Altair ® HyperView Player ™ is the first plug-in web browser available for visualizing the 3D Computer Aided Engineering (CAE) models and results." It is clear that in applicant's specimens of use, the term "player" is used in a highly descriptive if not generic fashion. Indeed, it is used as a synonym for the word "plug-in."

As previously noted, in the Raychem case this Board allowed registration of the mark TINEL-LOCK despite the fact that the specimens of use depicted the mark as follows: TRO6A1-TINEL-LOCK-RING. In so doing, the Board noted that "the generic name of [applicant's] product is plainly RING." Continuing, the Board stated that "even if it [the generic term] is used with a trademark, the generic name of the product need not be included as part of the words applicant seeks to register." Raychem, 12 USPQ2d at 1400.

In short, given the fact that the mark applicant seeks to register (HYPERVIEW) is physically separated from the word PLAYER, and the additional fact that the word "player" (or "plug-in") are clearly highly descriptive of, if not generic for, certain computer software that provides additional capabilities, we find that applicant's specimen of use is satisfactory.

Decision: The refusal to register is reversed because as depicted on the specimens of use, consumers would perceive applicant's mark as HYPERVIEW.